A

NISHIMATSU CONSTRUCTION CO LTD

v.

KECOM SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASAN LAH JCA
VINCENT NG JCA
[CIVIL APPEAL NO: J-02-519-2008]

C

22 JULY 2008

CIVIL PROCEDURE: *Injunction - Injunction restraining arbitration proceedings - No pre-existing cause of action - Whether injunction granted proper*

D

The respondent obtained an injunction restraining the appellant from instituting arbitration proceedings pursuant to an arbitration clause contained in an agreement between them. The issue was whether the injunction order was appropriate in view of the fact that the facts of the case showed that there was no pre-existing cause of action. The respondent submitted that there was a second part of the order that required the appellant to make discovery.

E

Held (allowing the appeal)

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Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) The injunction applied for should not have been granted because there was no pleading against the appellant on which the injunction could issue. The right to obtain an injunction is not a cause of action. There must be a cause of action pleaded in the usual fashion before an interlocutory injunction may be applied for and obtained. (para 3)

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(2) Save in circumstances set out in the decision of the House of Lords in *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, the court had no jurisdiction to grant anticipatory discovery, ie, discovery in anticipation of the action being filed. (para 5)

I

Bahasa Malaysia *Translation Of Headnotes*

Responden telah memperoleh injunksi bagi menghalang perayu dari memulakan prosiding timbangtara berdasarkan satu fasal timbangtara dalam perjanjian di antara mereka. Isunya adalah sama ada perintah injunksi tersebut wajar, mengambilkira fakta bahawa fakta-fakta kes menunjukkan bahawa tidak wujud sebarang kausa tindakan terdahulu. Responden berhujah bahawa terdapat bahagian kedua pada perintah yang memerlukan perayu untuk membuat penzahiran.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

(1) Injunksi yang dipohon tidak harus dibenarkan kerana tidak ada pliding terhadap perayu berasaskan mana injunksi boleh diberi. Hak untuk mendapatkan injunksi bukan suatu kausa tindakan. Harus wujud suatu kausa tindakan yang diplidkan seperti biasa sebelum sesuatu injunksi interlokutori boleh dipohon dan dibenarkan.

(2) Terkecuali dalam halkeadaan-halkeadaan seperti yang dibentangkan oleh keputusan House of Lords di dalam *Norwich Pharmacal Co v. Customs and Excise Commissioners*, mahkamah tiada bidangkuasa untuk membenarkan penzahiran dalam penantian, iaitu penzahiran sementara menunggu tindakan difailkan.

Case(s) referred to:
Norwich Pharmacal Co v. Customs and Excise Commissioners [1974] AC 133 ***(refd)***
Siskina (Cargo Owners) v. Distos Compania Naviera SA [1979] AC 210 ***(refd)***

For the appellant - Chang Tau Sian; M/s Henry Soong & Chang
For the respondent - Gan Techiong; M/s Gan & Lim

[Appeal from High Court, Muar; Civil Suit No: 22-10-10-2007]

Reported by Usha Thiagarajah

A

JUDGMENT
Oral

Gopal Sri Ram JCA:

B **[1]** This is the judgment of the court.

[2] We are unanimous in holding that this appeal must be allowed. The short facts which form the background of this appeal are as follows. There is an agreement in writing between the appellant and the respondent. It contains an arbitration clause C which selects Singapore as the forum. In 2007 two persons unconcerned with the contract between the appellant and respondent commenced proceedings against the respondent and one other. The appellant then took out an application to intervene in the action for the sole purpose of taking possession of the D tunnel component constructed by the respondent for use in the construction of the Mass Rapid Transport (MRT) in Singapore. The appellant deposited in court the purchase price of that component. Later, it terminated the agreement which it had with the respondent. Later still, it took out another application for leave E to take possession from the respondent of further components of the tunnel segment. The respondent then applied to the High Court in Muar and obtained an injunction restraining the appellant from instituting arbitration proceedings in Singapore pursuant to the arbitration clause.

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[3] In our judgment the injunction applied for should have not been granted because there was no pleading against the appellant on which the injunction could issue. It is settled law that the right to obtain an interlocutory injunction is not a cause of action. G There must be a cause of action pleaded in the usual fashion before an interlocutory injunction may be applied for and obtained. We consider it unnecessary to do more than refer to the following passage in the speech of Lord Diplock in the *Siskina (Cargo Owners) v. Distos Compania Naviera S.A* [1979] AC 210, 256:

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> … a right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the I defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and

incidental to the pre-existing cause of action. It is granted to preserve the *status quo* pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.

[4] For the reasons already given the injunction cannot stand. The order granting the injunction must be set aside and the injunction dissolved.

[5] Learned counsel for the respondent said that there is a second part of the order which requires the appellant to make discovery. Save in the circumstances set out in the decision of the House of Lords in *Norwich Pharmacal Co. v. Customs and Excise Commissioners* [1974] AC 133, the court has no jurisdiction to grant anticipatory discovery that is to say discovery in anticipation of the action being filed. We are therefore unable to agree with the learned judge that such an order ought to have been made on the facts of the instant case. It cannot and ought not to have been made. There was simply no pleading to warrant such an order. The same reasoning we have given earlier applies with equal force to this part of the judgment.

[6] It follows from what we have said thus far that the whole of the order dated 3 April 2008 cannot stand. It is set aside. The respondent must pay the appellant the costs of this appeal. The deposit in court shall be refunded to the appellant.